RECORD AND BRIEFS

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In the Supreme Court of the United States

ERNST & YOUNG LLP AND ERNST & YOUNG U.S. LLP,
PETITIONERS

v.

STEPHEN MORRIS AND KELLY MCDANIEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Rarely does a question presented so cry out for this Court's review. There are currently multiple petitions for certiorari pending from four different circuits on the question whether a provision in an employment agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis is enforceable. The parties in those cases, their respective amici, and disinterested commentators overwhelmingly agree that the question is exceptionally important, that the circuits are irreconcilably divided, and that the Court's immediate intervention is necessary. The parties disagree not about whether review is warranted, but only about which of the cases the Court should take.

Petitioners respectfully submit that this case is the best vehicle for resolution of the circuit conflict. This case presents a dispute over arbitrability in the context of a private lawsuit brought by employees against their employer—and, as such, avoids the collateral difficulties that would accompany review of an enforcement action by the National Labor Relations Board. This case squarely presents the question; it features thorough competing opinions from the court of appeals; and it involves an arbitration provision that is itself the subject of a circuit conflict. There is no benefit to granting review in any of the other pending cases. The petition for certiorari should therefore be granted, and the other petitions held pending the disposition in this case.

A. A Private Lawsuit Is The Superior Vehicle For Resolving The Question Presented

A private lawsuit between employees and their employer is the best vehicle for determining whether an employment agreement that requires an employee to arbitrate claims against an employer on an individual basis is enforceable. To begin with, the question arises most frequently in private lawsuits, not NLRB enforcement actions. See, *e.g.*, Pet. App. 2a-3a; *Patterson* v. *Raymours Furniture Co.*, No. 15-2820, 2016 WL 4598542, at *2 (2d Cir. Sept. 2, 2016) (summary order), petition for cert. pending, No. 16-388 (filed Sept. 22, 2016); *Lewis* v. *Epic Systems Corp.*, 823 F.3d 1147, 1155, 1157-1159 (7th Cir. 2016), petition for cert. pending, No. 16-285 (filed Sept. 2, 2016); *Sutherland* v. *Ernst & Young LLP*, 726 F.3d 290, 292-293 (2d Cir. 2013) (per curiam); *Owen* v. *Bristol Care, Inc.*, 702 F.3d 1050, 1051-1052 (8th Cir. 2013).

In the context of private lawsuits, moreover, the question is a pure one of statutory interpretation: does

Section 7 of the National Labor Relations Act prohibit the enforcement of the agreement at issue under Section 2 of the Federal Arbitration Act? To answer that question, a reviewing court need only consider the meaning of those two provisions and how they interact.

The analysis is more complicated, however, in an enforcement action by the NLRB. There, the dispositive question is not how Section 2 of the FAA interacts with Section 7 of the NLRA. Instead, the question is whether an employer has committed an "unfair labor practice" under Section 8(a)(1) of the NLRA by "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise" of a Section 7 right. 29 U.S.C. 158(a)(1). That is reflected in the NLRB's formulation of the question presented in its petition for certiorari in *NLRB* v. *Murphy Oil USA, Inc.*, No. 16-307 (filed Sept. 9, 2016). See Pet. at i.

That is a distinction with a considerable difference, as *Murphy Oil* itself illustrates. There, the NLRB ruled that the employer had violated Section 8 in two ways: by requiring individualized arbitration and by enforcing the arbitration provision. 361 N.L.R.B. No. 72, 2014 WL 5465454, at *24-*28 (Oct. 28, 2014), enforcement denied in part, 808 F.3d 1013 (5th Cir. 2015). To uphold either of those rulings, the Court would have to consider collateral issues that do not exist in private lawsuits.

As to violating Section 8 by requiring individualized arbitration: in *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2280 (2012), enforcement denied in part, 737 F.3d 344 (5th Cir. 2013), the NLRB determined that requiring individualized arbitration is itself an unfair labor practice because it "reasonably tends to chill employees in the exercise of their Section 7 rights." *Martin Luther Memorial Home, Inc.*, 343 N.L.R.B. 646, 646 (2004). That ruling raises three questions independent from the in-

terplay between Section 7 of the NLRA and Section 2 of the FAA. First, does the NLRB's "reasonably tends to chill" standard comport with Section 8 of the NLRA or warrant deference? See *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 536 (1992). Second, does the NLRB's *application* of that standard to employment agreements requiring individualized arbitration warrant deference? See *Allentown Mack Sales & Service, Inc.* v. *NLRB*, 522 U.S. 359, 366-367 (1998). Third, does substantial evidence support the NLRB's case-specific decision? See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477-490 (1951). For the NLRB to prevail in *Murphy Oil*, the Court would have to answer at least some of those questions, in addition to the straightforward question of statutory interpretation presented in private lawsuits such as this one.

As to violating Section 8 by enforcing the arbitration provision: the NLRB's ruling on that point raises an even thornier set of collateral issues. *Murphy Oil* was originally a collective action filed by employees against the employer in the United States District Court for the Northern District of Alabama. After the employer filed a motion to compel arbitration, the district court granted the motion and dismissed the employees' case. See *Murphy Oil USA, Inc.* v. *NLRB*, 808 F.3d 1013, 1015-1016 (5th Cir. 2015). In the meantime, the NLRB conducted an enforcement proceeding against the employer, ultimately ruling that the employer violated Section 8 of the NLRA by successfully enforcing its arbitration provision. See *ibid.*

That ruling raises serious constitutional concerns. An employer's ability to seek judicial relief against its employees—here, in the form of a motion to compel arbitration—implicates the First Amendment's Petition Clause. See *Bill Johnson's Restaurants, Inc.* v. *NLRB*,

461 U.S. 731, 744 (1983). As a result, an employer's lawsuit against its employees cannot constitute an unfair labor practice unless the lawsuit is objectively baseless. See *BE&K Construction Co.* v. *NLRB*, 536 U.S. 516, 533 (2002). This Court has implied (though not expressly held) that the lawsuit must also be motivated by retaliatory intent. See *id.* at 528-533; *id.* at 537 (Scalia, J., concurring).

Those concerns substantially complicate the *Murphy Oil* petition. In order to determine how the Petition Clause affects that case, the Court would need to engage in a multi-step analysis. First, it would need to decide whether filing a motion to compel arbitration implicates the Petition Clause. If the answer is yes, the Court would have to consider whether the motion in *Murphy Oil*—and, *a fortiori*, the district court's order granting the motion and compelling individual arbitration—was objectively baseless. The Court would also need to decide whether the employer acted with a retaliatory motive—and, if not, whether Petition Clause protection applies when an employer does not intend to retaliate. If the Petition Clause applies, it would present a threshold barrier to the question presented here: namely, whether Section 7 of the NLRA prohibits the enforcement of such an arbitration provision under Section 2 of the FAA. At a minimum, the threshold analysis would be difficult and complex.

In marked contrast, private cases are simpler and cut to the heart of the circuit conflict. Every private case in the conflict has focused directly on the interplay between Section 7 of the NLRA and Section 2 of the FAA. See Pet. App. 3a-42a; *Patterson*, 2016 WL 4598542, at *1-*3; *Lewis*, 823 F.3d at 1151-1161; *Owen*, 702 F.3d at 1052-1055; *Sutherland*, 726 F.3d at 296-299 & n.8. That is the

question on which the Court should grant review, and it is squarely and cleanly presented here.[1]

B. The NLRB's Presence As A Party Would Not Be Beneficial

The NLRB contends that *Murphy Oil* is a superior vehicle because "the [NLRB] is a party and is able to defend more directly its construction" of the NLRA. 16-307 Pet. 22 n.9. That contention does not withstand scrutiny.

To begin with, there is nothing the NLRB could add as a party that would assist the Court in analyzing the interaction between the FAA and the NLRA. The NLRB does not administer the FAA, and this Court has "never deferred to the [NLRB's] remedial preferences" when it comes to "federal statutes and policies unrelated to the NLRA." *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 144 (2002). Tellingly, no court of appeals to address the question presented has rested its holding on deference to the NLRB's position. See Pet. App. 11a & n.5; *Lewis*, 823 F.3d at 1153; *D.R. Horton*, 737 F.3d at 362; *Sutherland*, 726 F.3d at 297 n.8; *Owen*, 702 F.3d at 1053-1054.

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[1] Respondents identify only one collateral question that could potentially arise in a private case such as this one: namely, whether Section 3 of the Norris-LaGuardia Act, 29 U.S.C. 103, prevents federal courts from granting an employer's motion to compel arbitration. See Resp. Br. 15-17. That question is an entirely discrete (and logically subsequent) one; it does not go to a court's jurisdiction and thus does not present a threshold obstacle to this Court's review. See 29 U.S.C. 103. In addition, as respondents concede (see Resp. Br. 15), the court of appeals in this case did not address that question, and no conflict exists on that question because no court of appeals has accepted respondents' view of the scope of Section 3. See *Owen*, 702 F.3d at 1053; *D.R. Horton*, 737 F.3d at 362 n.10.

In any event, even if the NLRB were entitled to deference, the government could express its views equally well as an amicus curiae in a private case such as this one. As the NLRB acknowledges, it did just that in the court of appeals both in this case and in *Lewis*, *supra*. See 16-307 Pet. 22 n.9, 23 n.10. The NLRB does not contend that the government would have an inadequate opportunity to be heard through participation as an amicus, as it routinely does even in cases where its interest is substantial.

Indeed, it may actually be preferable to grant review in a case where the government participates as an amicus curiae, rather than the NLRB as a party, because the government's position on arbitration provisions in employment agreements may shift as a result of the impending change in administrations. See Alison Frankel, *How Trump DOJ Could Upend One of the Biggest Business Cases Facing SCOTUS*, Reuters (Nov. 22, 2016) <tinyurl.com/reuters-doj-arbitration>. The NLRB's position may also shift, as it has two vacancies that will likely be filled by the new President. See *ibid.*; Jeffrey M. Tanenbaum, Stacie B. Collier & Traci-Bernard Marks, *Trumping Obama's Employment Law Legacy*, Law360 (Nov. 16, 2016) <tinyurl.com/law360-labor-law>; Janette Levey Frisch, *Could the President-Elect Trump Recent NLRB Rulings?*, EmpLAWyerologist (Nov. 10, 2016) <tinyurl.com/recent-nlrb-rulings>; Jacob Gershman, *Trump Poised To Reshape Labor Board, Lawyers Say*, Wall St. J. Law Blog (Nov. 14, 2016) <tinyurl.com/nlrb-vacancies>. Granting review in a private case would afford the government the opportunity to express its views, taking into account any effect from the change in administrations, in a single amicus brief on behalf of the United States.

C. As Among The Private Cases Currently Pending, This Case Is The Best Vehicle For Resolving The Question Presented

Finally, this is the optimal private case in which to consider the interaction between the FAA and the NLRA. As a preliminary matter, the question presented in this case is broadly worded: whether the collective-bargaining provisions of the NLRA prohibit the enforcement under the FAA of an agreement requiring an employee to arbitrate claims on an individual, rather than collective, basis. That question encompasses all arguments related to (1) whether the NLRA contains a congressional command contrary to individual, rather than collective, arbitration; (2) whether the NLRA creates a substantive, non-waivable right to class proceedings in the employment context; and (3) whether the NLRA renders employment agreements requiring individual arbitration unenforceable under the saving clause in Section 2 of the FAA. The question presented here thus enables the parties to present the full range of relevant arguments to the Court.

In addition, there are no impediments to the Court's resolving the question presented in this case. The question presented was obviously pressed and passed upon below; indeed, it formed the sole basis for the court of appeals' decision.[2] And unlike in any other case in the

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[2] The petitioner in *Epic Systems Corp.* v. *Lewis*, No. 16-285, suggests that its case is the better vehicle because the decision below in that case "identified, considered, and ruled on only the question presented," and also because petitioners' arbitration agreement in this case requires the parties to mediate before proceeding to arbitration. See 16-285 Reply Br. 11-12. But that is mere window dressing. The court of appeals' decision in this case also addressed only one question relating to arbitration: whether the collective-bargaining

circuit conflict, the majority and dissenting opinions below fully develop the arguments on both sides of the question. No other opinions have so clearly and thoroughly framed the competing arguments. While the Court will certainly have the benefit of those opinions regardless, the very fact of such detailed competing opinions provides assurance that there are no lurking vehicle problems.

Perhaps most importantly, the circuit conflict at hand affects petitioners in a particularly acute way, making this case a uniquely compelling vehicle to resolve the question presented. Virtually all of petitioners' 40,000 employees agreed to the arbitration provision at issue here as a condition of employment. That provision is itself the subject of a circuit conflict, with the Second Circuit holding that it is valid and the Ninth Circuit holding that it is not. Compare *Sutherland*, 726 F.3d at 297 n.8, with Pet. App. 24a.

The existence of that EY-specific circuit conflict is reason enough why the Court cannot afford to wait to resolve the question presented, and it is also a reason why the Court should grant review in this case. Petitioners' ability to enforce their uniform, nationwide arbitration provision depends on where a given employee is located (or where the employee files suit). Petitioners thus have a particularly strong interest in defending the validity of provisions requiring an employee to arbitrate claims against an employer on an individual basis. The fact that petitioners' arbitration provision has itself di-

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provisions of the NLRA prohibit the enforcement under the FAA of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis. See Pet. App. 24a-25a. There is thus no valid reason to grant review in *Epic Systems* rather than in this case.

vided the circuits provides the added benefit of avoiding any problems arising from peculiarities in the language or method of adoption of less widely used agreements. For that reason, and for the reasons set out above, granting review in other cases would merely add complications without any offsetting benefit.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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